IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 167

SIDNEY J. UNGAR,

Appellant,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,

Appellee.

REPLY TO MOTION TO DISMISS

EMANUEL REDFIELD,
Counsel for Appellant.

IN THE

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OCTOBER TERM, 1962

No. 1139

SIDNEY J. UNGAR,

Appellant,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,

Appellee.

REPLY TO MOTION TO DISMISS

Jurisdiction

It is sufficient to emphasize that the validity of Section 751 was challenged at the first opportunity available to appellant, in a motion for a rehearing (see motion papers, as part of transcript of record), after the Court of Appeals had construed the statute for the first time, approving the trial of the contempt proceeding before the judge making the charges at a hearing after the conclusion of the trial at which the contempt occurred. In the cases cited in the Statement as to Jurisdiction, pages 18 and 19 and 4, to which should be added *Great Northern Railway Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366, this court under similar circumstances, took jurisdiction over such appeals.

Section 750 was also challenged by the appellant in the contempt proceeding, although not stated explicitly. Allowing that the appellant was without counsel in a hostile environment, the implicit challenge nevertheless appears throughout. Statement, page 17. This court in *Tomkins* v. *Missouri*, 323 U. S. 485, 487; *Pollard* v. *United States*, 352 U. S. 354, 359, recognized the sufficiency of implicit challenges under similar circumstances.

Timely federal challenges were made and passed upon by the Court of Appeals with respect to the application of Sections 750 and 751 to appellant, as was certified by that court. In any event, under 28 U. S. C. Section 2103, this Court can treat the appeal as a petition for a writ of certiorari and grant same.

The Questions Are Substantial

This is not the appropriate occasion to dwell on appellant's many disagreements with the facts as stated in the motion. The issues of law are too substantial to be clouded by essays on the facts.

But appellant must point to two, which unfortunately appear distorted.

The appellee states, page 4 and again page 8, that the appellant conceded in his Court of Appeals' brief, page 2, that the words which he uttered constituted a "prima facie contempt". That brief is not a part of the record here. But if it were, it would reveal the misinterpretation given it, because appellant there stated that it would be a contempt if the words had been said "deliberately and wilfully" and "with an intent to defy the dignity and authority of the court"; appellant then argued that no such facts or motives existed or were proved, and therefore there was no contempt. In any event, even if appellant's counsel had made such a concession what relevancy does it bear in this court?

The motion papers, page 5 and 7 refer to a "persistent" course of thirteen incidents of conduct. An analysis of said thirteen incidents will clearly reveal that these alleged "incidents of conduct" show that the appellant was not even remotely guilty of any contempt and that they only serve to create confusion. In any event, the sole charge of contempt was the one of November 25, 1960 therefore, the references at this time to other incidents is without relevancy. Nor was appellant charged with contempt for his manner of expression, bearing and attitude, for which appellee cites *Fisher* v. *Pace*, 336 U. S. 159, 161 for support. He was charged only for uttering words. If any "pictures" of the event were to be injected as an issue, they would favor the appellant, for they would depict a witness laboring under incredible emotional pressures and tensions in a courtroom in which the court was hostile toward him, and the invective of both prosecution and defense counsel was trained against him to make it appear as if he were the person on trial.

Appellant has demonstrated adequately in his Statement that substantial issues require that this court review this case. Aside from the challenge to the validity of the statute, there is presented the serious question arising from a state court, whether a judge who is personally embroiled with a witness may sit in judgment at a trial for an alleged contempt with which he has charged the witness, and in which the judge is complainant and prosecutor, as well as judge and jury. This is a substantial question which merits serious review by this court, since it invokes the due process sought to be protected by the Fourteenth Amendment.

Sacher v. *United States* Has Not Disposed of the Questions

The appellee seeks to minimize the seriousness of the issues raised, by argument that the *Sacher* case is dispositive of them.

The answer is threefold:

First, Sacher arose in the federal courts, and it came before this court under its supervisory powers as an application of the federal contempt statute. The present case comes to this court under the Fourteenth Amendment for the protection of the life, liberty and property by due process against the acts of state officials.

Second, Sacher was cast aside by this court in *Offutt* v. *United States,* 348 U. S. 11, another federal case under the supervisory powers of this court. The court's opinion was written by Justice Frankfurter, who had objected to the *Sacher* ruling permitting summary dispositions after the trial had been concluded. See also, *Brown* v. *United States,* 359 U. S. 41, 61; Frederick Bernays Wiener, 48 A. B. A. Journal at 1024; Note, in 69 Harvard Law Review, 161 (1955); 3 L.ed 1862, Sect. 11; 64 ALR2d, 621, Sect. 12 (b).

Third, in *Sacher,* at the conclusion of the trial, the court then and there held Sacher in contempt. Here, however, appellee recognized the need for a plenary hearing, by commencing one, but did not accord it by depriving appellant of an adequate opportunity to defend, and by himself presiding at the contempt proceeding. Appellee argues that there was no need under the statute and decisions to provide a remedy other than a summary one before the same judge. Appellant contends to the contrary, that since the trial had been concluded before the contempt proceedings were initiated, he should have had a plenary

hearing before a judge other than the one with whom he was involved.

The appellee in capsulizing appellant's arguments, would make it appear as if appellant were stressing the deferring of the contempt proceeding, as his sole grievance. On the contrary, appellant places his greatest stress upon the claim that due process required that a judge should not have sat in judgment on his own contempt charges at a proceeding held days after the trial was concluded.

The reference by appellee in his motion to *Fisher* v. *Pace*, 336 U. S. 155, serves as an apt illustration of the tyranny that is latent in the power to punish for contempt especially, in a summary proceeding, as was that case, held before the same judge immediately at the contempt occurrence. The dissenting opinion of Justice Douglas, with the concurrence of Justice Black at page 163, and the dissenting opinions of Justice Murphy, page 166 and of Justice Rutledge, page 168, point up the flagrant abuses about which appellant complains, and give support to appellant's assertion of substantiality.

This case therefore presents to this court novel questions for review. It also affords this court an opportunity to re-examine the entire practice of contempt proceedings whereby a judge makes the charges, construes the law, passes on the facts and renders judgment.

EMANUEL REDFIELD,
Counsel for Appellant.

July 1, 1963.